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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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6 PASA AVDIC,) No. CV-06-0044-CI
7 Plaintiff,)
8 v.) ORDER GRANTING PLAINTIFF'S
9 JO ANNE B. BARNHART,) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND DIRECTING AN IMMEDIATE
Security,) AWARD OF BENEFITS
11 Defendant.

12

13 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.
14 Rec. 12, 15.) Attorney Maureen Rosette represents Pasa Avdic
15 (Plaintiff); Assistant United States Attorney Pamela DeRusha and
16 Special Assistant United States Attorney L. Jamala Edwards represent
17 the Defendant. The parties have consented to proceed before a
18 magistrate judge. (Ct. Rec. 6.) After reviewing the administrative
19 record and pleadings filed by the parties, the court **GRANTS**
20 Plaintiff's Motion for Summary Judgment and directs an immediate
21 award of benefits.

22

I. JURISDICTION

23 Plaintiff protectively filed for Social Security Income (SSI)
24 on February 11, 2003. (Tr. 111-114.) She alleged disability due to
25 mental illness with an alleged onset date of October 1, 2002.¹ (Tr.

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27 ¹ Plaintiff's application is for Social Security Income (SSI)
28 benefits only, under Title XVI of the Social Security Act. (Tr.

1 111-114.) The Administrative Law Judge (ALJ) determined that a
 2 hearing was unnecessary. (Tr. 61, 65.) ALJ John R. Hood found
 3 Plaintiff disabled in a fully favorable decision issued November 13,
 4 2003. (Tr. 56-66.) On its own motion the Appeals Council reviewed
 5 the ALJ's decision, found that it was not supported by substantial
 6 evidence, and remanded to the ALJ for a new determination. (Tr. 80-
 7 87.) The ALJ held a hearing on December 14, 2004. In a decision
 8 entered on July 14, 2005, the ALJ found that Plaintiff could return
 9 to her past work as a janitor or laundry worker, and was therefore
 10 not disabled. (Tr. 17-22.) The Appeals Council denied review,
 11 making the ALJ's decision the final decision of the Commissioner.
 12 (Tr. 5-7.) The instant matter is before the district court pursuant
 13 to 42 U.S.C. § 405(g).

14 **II. SEQUENTIAL EVALUATION**

15 The Social Security Act defines disability as the "inability to
 16 engage in any substantial gainful activity by reason of any
 17 medically determinable physical or mental impairment which can be
 18 expected to result in death or which has lasted or can be expected
 19 to last for a continuous period of not less than twelve months." 42
 20 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that
 21 a claimant shall be determined to be under a disability only if the
 22 impairments are of such severity that the claimant is not only
 23 unable to do previous work but cannot, considering claimant's age,
 24 education and work experiences, engage in any other substantial

25
 26 111-114.) In Title XVI cases "onset will be established as of the
 27 date of filing provided the individual is disabled on that date."
 28 *SSR 83-20.*

1 gainful work which exists in the national economy. 42 U.S.C. §§
2 423(d)(2)(A), 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential
4 evaluation process for determining whether a person is disabled. 20
5 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42
6 (1987). In steps one through four, a claimant must demonstrate a
7 severe impairment and an inability to perform past work. *Erickson*
8 *v. Shalala*, 9 F.3d 813 (1993). If a claimant meets those
9 requirements, the burden shifts to the Commissioner to demonstrate
10 at step five that a claimant can engage in other types of
11 substantial gainful work which exists in the national economy.
12 *Erickson*, at 817 (citing *Gallant v. Heckler*, 753 F.2d 1450, 1452
13 (9th Cir. 1984)). To make this determination, the Commissioner must
14 consider a claimant's age, education and work experience. 20 C.F.R.
15 § 404.1520(f); 416.920(f). See *Bowen v. Yuckert*, 482 U.S. 137
16 (1987).

17 III. STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) the
19 court set out the standard of review:

20 A district court's order upholding the Commissioner's
21 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
22 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
23 Commissioner may be reversed only if it is not supported
24 by substantial evidence or if it is based on legal error.
25 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
26 evidence is defined as being more than a mere
27 scintilla, but less than a preponderance. *Id.* at 1098. Put
28 another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401, 91 S.Ct. 1420 (1971). If the evidence is
susceptible to more than one rational interpretation, the
court may not substitute its judgment for that of the
Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v.*
Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th

1 Cir. 1999).

2 The ALJ is responsible for determining credibility,
3 resolving conflicts in medical testimony, and resolving
4 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
5 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

6 **IV. STATEMENT OF THE CASE**

7 Detailed facts of the case are set forth in the transcript of
8 proceedings and the parties' pleadings and are briefly summarized
9 here. Plaintiff was 49 years old at the time of the ALJ hearing.
10 (Tr. 38.) She was from Bosnia and had never attended school, other
11 than for twenty days in the United States in an English as a Second
12 Language class. (Tr. 39.) Plaintiff is not able to speak, read or
13 write English. (Tr. 39.) She has relevant work experience as a
14 laundry worker and janitor. (Tr. 38, 48-49.) Plaintiff said that
15 she is not able to do math. (Tr. 39.) Plaintiff testified that she
16 became unable to work washing hotel laundry because she would get
17 sick and get lost. (Tr. 39.) She testified she has extreme
18 headaches, problems sleeping and her nerves are "shot." (Tr. 40.)
19 Plaintiff said she feels like she is hearing voices, has flashbacks
20 from the Bosnian war a couple of times daily, and has nightmares.
21 She lives in an apartment and does not drive. Her daughter cooks
22 her meals for her, and sometimes helps her bathe and shower. (Tr.
23 41-44.)

24 Medical expert Allen Bostwick, Ph.D., and Vocational Expert
25 (VE) Tom Moreland testified at the hearing. Mr. Moreland testified
26 that a person of the Plaintiff's age and background, who has
27 moderate limitations in concentration, persistence and pace, could
28

1 not be competitively employed on a reasonably continuous and
2 sustained basis. (Tr. 50.)

3 **V. ADMINISTRATIVE DECISION**

4 At step one, ALJ Hood found Plaintiff had not engaged in
5 substantial gainful activity since her alleged onset date; at steps
6 two and three, he found Plaintiff had the "severe" impairments of
7 depression and an anxiety-related disorder, but these impairments
8 did not meet or equal a listed impairment in Appendix 1, Subpart P,
9 Regulation No. 4 of the Regulations. (Tr. 18-19.) After the
10 hearing and in the second decision, the ALJ found Plaintiff's
11 allegations regarding her limitations were not totally credible. The
12 ALJ based this determination on Plaintiff's effort on tests given by
13 Joyce Everhart, Ph.D., even though the ALJ had relied on the results
14 of this exam to find Plaintiff disabled in the first decision. (Tr.
15 20-21.) At step four, the ALJ found Plaintiff had the residual
16 functional capacity (RFC) to perform work at all levels of physical
17 exertion, but due to her mental impairments, she is limited to work
18 involving "routine and repetitive tasks and simple instructions to
19 understand, remember and carry out would be consistent with
20 unskilled work." (Tr. 19, 21.) He found Plaintiff could perform
21 her past relevant work. (Tr. 21.) The ALJ determined Plaintiff was
22 "not disabled" as defined by the Social Security Act. (Tr. 21.)

23 **VI. ISSUES**

24 The question presented is whether the ALJ's decision is
25 supported by substantial evidence and is free of legal error.
26 Specifically, Plaintiff argues the ALJ erred when he did not give
27 adequate reasons for rejecting the medical opinions of her treating
28 physician and examining psychologists. (Ct. Rec. 13 at 9.) She

1 also contends that in the ALJ's first decision, he relied on Dr.
2 Everhart's opinion (particularly the assessed GAF of 50), when he
3 found her disabled. Because Dr. Everhart's opinion did not change
4 between the first and second decisions, Plaintiff argues that the
5 ALJ should have again relied on that opinion and again found her
6 disabled. (Ct. Rec. 13 at 6-7.) The additional issues Plaintiff
7 raises are whether the ALJ's determination that she can perform her
8 past work is supported by the record, and whether the ALJ properly
9 considered the vocational expert's testimony. The first issue is
10 dispositive.

11 VII. DISCUSSION

12 A. Medical Source Opinions

13 In social security proceedings, the claimant must prove the
14 existence of a physical or mental impairment by providing medical
15 evidence consisting of signs, symptoms, and laboratory findings; the
16 claimant's own statement of symptoms alone will not suffice. 20
17 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
18 the basis of a medically determinable impairment which can be shown
19 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical
20 evidence of an underlying impairment has been shown, medical
21 findings are not required to support the alleged severity of
22 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

23 A treating or examining physician's opinion is given more
24 weight than that of a non-examining physician. *Benecke v. Barnhart*,
25 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
26 physician's opinions are not contradicted, they can be rejected only
27 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
28 830 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion

1 if he states specific, legitimate reasons that are supported by
2 substantial evidence. See *Flaten v. Secretary of Health and Human*
3 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995). In addition to medical
4 reports in the record, the analysis and opinion of a non-examining
5 medical expert selected by an ALJ may be helpful in his
6 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)
7 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989)).
8 Testimony of a medical expert may serve as substantial evidence when
9 supported by other evidence in the record. *Id.*

10 On January 21, 2004, Plaintiff's primary care physician, Duncan
11 Lahntinen, D.O., opined that she was markedly impaired in three
12 areas and moderately impaired in eight areas of work-related
13 functioning. (Tr. 210-211.) In June 2003, Joyce Everhart, Ph.D.,
14 evaluated Plaintiff and assessed a GAF of 50. On July 8, 2003,
15 consulting agency physician Eugene Kester diagnosed an affective
16 disorder and an anxiety-related disorder. (Tr. 182.) Dr. Kester,
17 relying in part on Dr. Everhart's conclusions, opined that Plaintiff
18 "has the cognitive ability to continue unskilled, repetitive work.
19 Persistence may be compromised due to the interaction of physical
20 and psychological factors." (Tr. 194.) Consulting agency physician
21 Michael Brown, Ph.D., agreed with Dr. Kester's diagnoses and
22 assessment of limitations. (Tr. 196, 208.)

23 In his second decision, the ALJ rejected Dr. Lahntinen's
24 opinion because it was inconsistent with Dr. Everhart's evaluation,
25 Dr. Everhart is more qualified to assess mental limitations, and, as
26 the treating physician, Dr. Lahntinen was perhaps "trying to be as
27 supportive as possible and in accordance with his patient's wishes."
28 (Tr. 19-20.)

1 Dr. Everhart's assessed GAF of 50 is indicative of "serious
2 symptoms or any serious impairment in social, occupational or school
3 functioning."² With respect to the severity of Plaintiff's
4 limitations, Dr. Everhart does not contradict the opinion of
5 Plaintiff's treating physician. Although Plaintiff did not complete
6 all tasks during the evaluation, and Dr. Everhart considered that
7 this might be indicative of malingering or lack of effort, she went
8 on to assess a GAF of 50. The opinions of consulting agency
9 physicians Drs. Kester and Brown are essentially in accord:
10 Plaintiff suffers moderate difficulties maintaining concentration,
11 persistence or pace (Kester at Tr. 192); Plaintiff is markedly
12 limited in her ability to interact with the general public and
13 moderately limited with respect to concentration, persistence or
14 pace. (Brown at Tr. 208.)

15 As noted, if the treating or examining physician's opinions are
16 not contradicted, they can be rejected only with clear and
17 convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
18 1996). If contradicted, the ALJ may reject an opinion if he states
19 specific, legitimate reasons that are supported by substantial
20 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
21 F.3d 1453, 1463 (9th Cir. 1995). Testimony of a medical expert may
22 serve as substantial evidence when supported by other evidence in
23 the record. *Andrews v. Shalala*, 53 F. 3d 1035, 1041 (9th Cir. 1995).

24 The ALJ fails to present clear and convincing reasons for
25 rejecting all of the medical evidence of record except the opinion

² Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), at 32 (1995).

1 of the testifying physician, Allen Bostwick, Ph.D., Dr. Bostwick
2 opined that Plaintiff suffers from no medically determinable
3 impairment "due to malingering" on objective psychological testing.
4 (Tr. 32.) (Emphasis added.) Dr. Bostwick refers to Dr. Everhart's
5 evaluation as support for his unique diagnosis. Dr. Everhart did not
6 diagnose malingering, assessed a GAF of 50, and instead diagnosed a
7 generalized anxiety disorder, PTSD (chronic), major depressive
8 disorder (single episode, moderate, with psychotic features
9 (auditory hallucinations), rule out malingering, and rule out
10 medical reasons for depression, psychotic features and anxiety).
11 (Tr. 175-176.) In further contrast to Dr. Bostwick's misuse of her
12 examination results, Dr. Everhart also opined that Plaintiff is
13 likely to need help managing her funds and that her persistence is
14 likely compromised due to the interaction of her physical and
15 psychological symptoms. (Tr. 176-177.) Dr. Bostwick's opinion is
16 unique and not supported by other evidence in the record. The ALJ
17 erred when he rejected the opinions of all of the physicians except
18 that of the testifying medical expert.

19 B. Appeals Council

20 The Appeals Council took review on its own motion and found
21 that the original favorable decision was not supported by
22 substantial evidence. (Tr. 80.) The Council cites five instances
23 where substantial evidence is lacking: 1) the ALJ lists dementia as
24 a severe impairment, but no treating or examining physician
25 diagnosed dementia; 2) the ALJ failed to include a credibility
26 determination; 3) no medical records supported Plaintiff's
27 allegation that she had fainted twice at work; 4) Plaintiff's height
28 is listed inconsistently in the record; and 5) the record is

inconsistent with respect to whether Plaintiff is moderately or markedly limited in dealing with the public. (Tr. 81.)

A careful review of the record indicates that the first ALJ's decision was supported by substantial evidence and should have been affirmed.

The ALJ's first decision states that Plaintiff suffers from the severe impairments of dementia and an affective disorder. (Tr. 62.) The Appeals Council is correct that dementia was not diagnosed by Plaintiff's treating or examining physicians. At the end of his decision, however, at finding number 2, the ALJ states that Plaintiff suffers from the impairments of "a severe affective disorder and anxiety related disorders." (Tr. 64.) This is the diagnosis made by physician David Henzler, M.D.,³ (chronic headaches and PTSD with anxiety and depression); examining physician Joyce Everhart, Ph.D. (generalized anxiety disorder, PTSD, chronic, major depressive episode, single episode, moderate, with psychotic features (auditory hallucinations), rule out malingering and rule out medical reasons for depression, psychotic features, and anxiety); consulting agency physicians Eugene Kester (affective and anxiety related disorders, with possible major depression with psychotic features, rule out malingering), and Michael Brown, Ph.D. (affective and anxiety related disorders, possible PTSD, major depressive disorder with psychotic features, rule out malingering). (Tr. 159, 175, 182, 185, 196.) The ALJ's initial notation that

³ Plaintiff's treating physician, Duncan Lahtinen, D.O., referred her to Dr. Henzler for a neurological evaluation due to headaches.

1 Plaintiff suffered from dementia does not appear anywhere else in
2 the record and was corrected by the ALJ in his findings later in the
3 same decision. The single reference to dementia in the body of the
4 decision appears to be simply a typographical error.

5 The second basis of allegedly insubstantial evidence is the
6 ALJ's failure to assess Plaintiff's credibility. (Tr. 81.) The
7 ALJ's first decision was based on consistent medical evidence of
8 mental impairments, and included the opinions of treating, examining
9 and consulting agency physicians.⁴ Pursuant to 20 C.F.R. §
10 416.1448(a),⁵ the ALJ determined that a hearing prior to the first
11 decision was unnecessary. (Tr. 61.) It could not have been error for
12 the ALJ to fail to make an explicit credibility determination given
13 that the medical evidence fully supported a finding of disability
14 even without conducting an oral hearing.

15 The Appeals Council found the ALJ's decision was not supported
16 by substantial evidence because Plaintiff said she fainted at work
17 twice, but no medical evidence supported this claim. The Appeals
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19 ⁴ Consulting agency physician Eugene Kester, M.D., and
20 examining physician Joyce Everhart, Ph.D., note that Plaintiff
21 reported she has trouble finding her way home and the police help
22 her. She also has some help with her activities of daily living.
23 (Tr. 194, 176.)

25 ⁵ Section 416.1448 (a) provides: "If the evidence in the
26 hearing record supports a finding in favor of you and all the
27 parties on every issue, the administrative law judge may issue a
28 hearing decision without holding an oral hearing."

1 Council is correct; however, Plaintiff's disability claim is based
2 solely on mental impairments. The lack of evidence of the physical
3 impairment of fainting at work is irrelevant and does not signal
4 error by the ALJ in his first determination that Plaintiff suffers
5 severe mental impairments.

6 Similarly, the Appeals Council found that the ALJ's decision
7 was not supported by substantial evidence because the record lists
8 Plaintiff's height inconsistently and "[a]lthough this may be a
9 clerical error, the issue was not resolved." (Tr. 81.) Again,
10 because Plaintiff's impairments are mental rather than physical, it
11 is difficult to discern why the Appeals Council found this
12 inconsistency significant enough to warrant remand. To the extent
13 that Plaintiff's height is significant, examining physician Joyce
14 Everhart, Ph.D., noted that Plaintiff appeared to be her stated
15 height of 5'7. (Tr. 174.)

16 The Appeals Council found that the ALJ's decision was not
17 supported by substantial evidence because Plaintiff's ability to
18 work with the general public is variously described in the record
19 as "moderate" or "markedly" limited, and the issue was not resolved.
20 (Tr. 81.) It is significant that none of Plaintiff's past relevant
21 work involved working with the public. Moreover, the Appeals
22 Council is incorrect: the ALJ resolved this issue. In his
23 hypothetical posed to VE Moreland at the hearing, the ALJ included
24 a moderate difficulty in maintaining social functions. (Tr. 49.)
25 It appears the ALJ did resolve the conflict in the evidence and
26 found that Plaintiff was moderately rather than severely limited in
27 this area. This medical evidence supports rather than undercuts the
28 ALJ's initial determination that Plaintiff is disabled by her mental

1 impairments. It does not support the Appeals Council's assertion
2 that the ALJ's fully favorable decision lacked the support of
3 substantial evidence.

4 In his first decision, the ALJ found Plaintiff had the severe
5 mental impairments of depression and an anxiety-related disorder.
6 (Tr. 64.) The record supports this finding. The record also
7 reveals that Plaintiff becomes lost easily and needs the help of
8 police in finding her way home, cannot drive, has most of her meals
9 prepared by her daughter, has problems with nightmares, isolates
10 herself, and sometimes requires her daughter's help with maintaining
11 personal hygiene. Although she is not physically impaired, all of
12 the evidence of record (except that of the testifying medical
13 expert), indicates that Plaintiff's concentration, persistence and
14 pace are at least moderately impaired to the extent that she is
15 unable to work even at unskilled jobs on a sustained basis.⁶

16 The ALJ's decision after remand did not adequately reject the
17 limitations assessed by Plaintiff's treating and examining
18 physicians, nor by agency physicians Drs. Kester and Brown.
19 Following remand by the Appeals Council, the ALJ appears to have
20 relied exclusively on the opinion of the testifying medical expert
21 and by select sections of Dr. Everhart's evaluation. As Plaintiff
22 points out, Dr. Everhart assessed a GAF of 50 which did not change
23 between the first and second decisions. The portions of Dr.
24 Everhart's opinion discussing Plaintiff's cognitive functioning do
25 not support the ALJ's second decision finding Plaintiff capable of

27 ⁶ This is the opinion of testifying Vocational Expert Tom
28 Moreland in response to the ALJ's hypothetical. (Tr. 50.)

1 routine repetitive tasks and simple instructions. There is simply
2 no medical evidence aside from that of the testifying medical expert
3 that supports assessing less than "moderate" limitations with
4 respect to concentration, persistence and pace. Plaintiff's
5 treating physician opined that she has three severe and eight
6 moderate work-related limitations. The VE's opinion based on a
7 hypothetical including the assessed limitation with respect to
8 concentration, persistence and pace was that it would be very
9 difficult for a person with Plaintiff's mental limitations to do any
10 work on a sustained basis.

11 C. Remedy

12 There are two remedies where the ALJ fails to provide adequate
13 reasons for rejecting the opinions of a treating or examining
14 psychologist. The general rule, found in the *Lester* line of cases,
15 is that "we credit that opinion as a matter of law." *Lester*, 81
16 F.3d at 834; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990);
17 *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Under the
18 alternate approach found in *McAllister*, *supra*, a court may remand to
19 allow the ALJ to provide the requisite specific and legitimate
20 reasons for disregarding the opinion. See also *Benecke*, 379 F.3d at
21 594 (court has flexibility in crediting testimony if substantial
22 questions remain as to claimant's credibility and other issues).
23 Where evidence has been identified that may be a basis for a
24 finding, but the findings are not articulated, remand is the proper
25 disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990)
26 (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9th
27 Cir. 1990). When credited as a matter of law, it is clear from the
28 opinions of all physicians except the testifying physician that

1 Plaintiff is disabled. Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
4 **GRANTED**; the matter is **REMANDED** for payment of an immediate award of
5 benefits.

6 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
7 **DENIED**.

8 3. Judgment for the **Plaintiff** shall be entered.

9 4. The District Court Executive is directed to enter this
10 Order, forward copies to counsel, and close this file.

11 DATED January 18, 2007.

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S/ CYNTHIA IMBROGNO
14 UNITED STATES MAGISTRATE JUDGE
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